IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1941

No.....

ARTHUR T. LELLES, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF AND APPENDIX

WILLIAM A. GILMORE
Attorney for Petitioner

Seattle, Washington

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TO THE HONORABLE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

The petitioner, Arthur T. Lelles by William A. Gilmore, his Attorney, prays that a Writ of Certiorari issue

to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, dated June 7, 1941 (R. 652, Vol. II), which affirmed a judgment of the United States District Court for the Western District of Washington, Northern Division, dated June 28, 1940, sentencing the defendant to three years' imprisonment on each count running concurrently (R. 55-60, Vol. I).

OPINION OF THE CIRCUIT COURT FOR THE NINTH CIRCUIT.

The Circuit Court of Appeals for the Ninth Circuit rendered an opinion which has not yet been reported but appears in Vol. II of the Transcript of the Record at page 648.

JURISDICTION OF THE SUPREME COURT.

The Supreme Court has jurisdiction to review the judgment below under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (43 Stat. 938) and under Rules XI and XII of the Rules of Criminal Practice and Procedure in criminal cases promulgated by the Supreme Court on May 7, 1934, pursuant to the Act of February 23, 1933. The date of the judgment of the Circuit Court of Appeals sought to be reviewed is June 7, 1941, (R. 652, Vol. II). A petition for rehearing was filed by petitioner on July 3, 1941, and within the time allowed therefor by rules of the Circuit Court, and that petition was denied on July 21, 1941. (Tr. of R. page 653, Vol. II). An order was made staying issuance of mandate to and including August 25, 1941. (Tr. of R. page 654,

Vol II) which is thirty days after the entry of the order denying the petition for rehearing, excluding, as provided in Rule XIII of the Rules of Criminal Practice and Procedure, Sundays and holidays.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED AND THE REASONS RELIED ON FOR THE ALLOWANCE OF WRIT.

On June 15, 1940, the petitioner was found guilty by a jury in the United States District Court for the Western District of Washington, Northern Division, upon an indictment charging him with the crime of using the mails in a scheme to defraud in violation of Section 338 Title 18, U. S. C. A. (U. S. Criminal Code, Sec. 215), (a copy of said section being set forth in the Appendix hereto). The indictment, (R. 2-35, Vol I), was in eight counts. Count VII was withdrawn from the consideration of the jury and the defendant was found guilty on the remaining seven counts of the indictment. (Verdict R. 52-53, Vol. I). On June 28, 1940, the defendant was sentenced by the Trial Judge to three years' imprisonment on each of six counts running concurrently and a suspended sentence on Count IV. (R. 55-60, Vol. I). The petitioner within the time allowed by the Rules of the Court filed notice of appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment of conviction and thereafter prosecuted his appeal to a conclusion in the Circuit Court of Appeals for the Ninth Circuit. (R. 652, Vol. II).

The indictment (R. 2-35, Vol. I) is exceedingly lengthy. Briefly, it charges the petitioner with devising and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, by

> *"Representing himself as engaged in the business of dealing in fresh, canned, and dried mushrooms at wholesale and retail, and also engaged in the business of supplying mushroom growing outfits, including spawn, Amco Fertilizer, thermometers for testing mushrooms, and manuals of instructions for mushroom culture, under the name of Washington Mushroom Industries,"*

and the indictment further charges that the petitioner did deceive and mislead purchasers by pretending and representing the time, extent and size of his business, misleading advertisements, the easy culture of mushrooms, the simplified instructions for beginners in growing mushrooms, the quality of mushroom spawn, the replacement of spawn, the quality of Amco Fertilizer, the easy way to make money, the shipping of mushrooms to market and the value of the mushroom product, and that the petitioner used the mails in connection with his business. The eight counts of the indictment are interwoven and all practically charge the same offense of sending letters through the United States mails to further his plan or scheme.

The petitioner in his defense at the trial contended that he was engaged in a legitimate business as stated in the quotation from the indictment above, and that he had an office, warehouse and factory for several years in Seattle and some six thousand customers in the United States

and some foreign countries, all of whom were satisfied in growing and selling mushrooms under his plan and instructions, (R. 408-494, Vol. I and 495-583, Vol. II), except those who were unsuccessful and whose opinions and grievances were given to the jury by the Government, (R. 68-407, Vol. I).

SPECIFICATION OF ERRORS.

1. *The Circuit Court of Appeals erred in deciding and affirming the trial court in denying the petitioner's challenge to the legal sufficiency of the evidence at the close of the entire case,* (Assignments V, VI, VII and VIII, R. 639-41, Vol. II), *and refusing to direct a verdict in favor of the petitioner upon the grounds that there was no evidence submitted by the Government connecting the defendant with any scheme or artifice to defraud within the meaning of the section of the Criminal Code mentioned in the indictment.* (R. 650, Vol. II).

2. *The Circuit Court of Appeals erred in entering its judgment* (R. 652, Vol. II), *affirming the judgment of the trial court.*

REASONS RELIED ON BY PETITIONER FOR GRANTING WRIT OF CERTIORARI.

POINT I. *The Circuit Court of Appeals in affirming the judgment of the trial court did not give proper effect to an applicable decision of this Court and has decided a federal question in a way probably in conflict with applicable decisions of this court.*

POINT II. *The Circuit Court of Appeals in affirming the judgment of the trial court has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on similar matters covered by said section of the Criminal Code involved in this case.*

POINT III. *The Circuit Court of Appeals in affirming the judgment of the trial court has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.*

POINT IV. *The Circuit Court of Appeals in affirming the decision of the trial court has decided an important question of federal law applicable to the criminal statute involved which should be settled by the decision of this court.*

ARTHUR T. LELLES,
Petitioner

By WILLIAM A. GILMORE,
Attorney for Petitioner

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1941

No.....

ARTHUR T. LELLES, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

POINT I.

The Circuit Court of Appeals in affirming the judgment of the trial court did not give proper effect to an applicable decision of this Court and has decided a federal question in a way probably in conflict with applicable decisions of this Court.

It is petitioner's contention that the Circuit Court of Appeals did not follow and give proper effect to the decision of this Court in the case of *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94, 23 Sup.

Ct. 33, 47 L. Ed. 90. That was a case wherein the postoffice department refused to allow the petitioner the right to use the mails. Briefly, the facts were that in and about their business they carried on and conducted not only the treatment of people afflicted with ills at their establishment but also engaged in the business of teaching and educating others in the practical science of healing and that a large amount of their business consisted of treatments by mail and advice to people throughout the United States and foreign countries, using the mails for such purpose. Complaints by many treated had been made to the postal authorities against the Healing School. Many were cured of ills and believed in the treatment accorded. Quoting briefly from page 107 of the opinion, the Court says:

> *"It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all, it is, in each case, opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved, as matter of fact, that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and as, in our opinion, it is used in these statutes."*

The petitioner in his evidence (R. 408-494, Vol. I and 495-583, Vol. II) submitted to the trial court and jury evidence that he was engaged in the business of dealing in fresh, canned and dried mushrooms at wholesale and retail and had been so engaged for a great many years before he filed his trade-name in 1937, and also that he was engaged in the business of supplying mushroom growing outfits including spawn and Amco Fertilizer, thermometers for testing mushrooms, and manuals of instruction for mushroom culture under the name of Washington Mushroom Industries. The Government in its case called about one hundred witnesses out of some six thousand patrons who testified that they did not or could not raise mushrooms, many of whom blamed themselves for not following instructions such as in preparing the proper mushroom beds, compost, improper air, too much water applied, and numerous other excuses. The defendant called some fifty witnesses who testified that they followed the instructions and were successful in growing mushrooms. In each case the witnesses usually gave their opinion of the defendant's business, either favorable or unfavorable, and at the conclusion of the trial the court permitted the jury to decide between the opinions of the two groups, contrary to the decision of this Court in the *McAnnulty* case, *supra*. The defendant testified that he had used the mails over a period of many years in correspondence, by letters and circulars as well as the parcel post in connection with his business of mushroom culture. He testified that he had an office, factory and warehouse in Seattle. The Government did not contradict him in any way by

any testimony that he had not been in business during the time that he said he was so engaged, and did not contradict him as to his office and factory except to belittle the size of the same before the jury. The principal complaint of the Government was that he had been engaged in exaggeration of his literature advertising his business. It is our contention as we will show by some authorities cited below, that exaggerating or "puffing" one's business does not bring the matter within the section of the Criminal Code complained of in using the mails to promote frauds.

Can it be said that under the rule announced in the *McAnnulty* case that a man could be prosecuted for conducting a business where A says that he could not raise mushrooms under the directions of the petitioner while B says that he followed the same directions and did raise mushrooms? Does it not come squarely within the spirit and letter of the decision of this Court in the *McAnnulty* case which refuses to permit the Circuit Court to hold that petitioner can be prosecuted for using the mails to defraud where the matter is purely one of opinion?

POINT II.

The Circuit Court of Appeals in affirming the judgment of the trial court has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on similar matters covered by said section of the Criminal Code involved in this case.

For brevity in this brief we will discuss Points II, III and IV together.

The decision of the Ninth Circuit Court of Appeals in this case is not in harmony with the decisions of other

Circuit Courts construing the statute of using the mails to defraud. One of the best decisions interpreting the meaning and intent of the statute is to be found in *Harrison vs. United States,* 200 Fed. 662. There Judge Denison, speaking for the Court, says:

> *"The statute makes it a crime—a felony—to use the mails in promoting a 'scheme to defraud.' This statute has received consideration, definition, and application in a great number of decided cases—among others, by the Supreme Court in* Durland vs. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, *and* U. S. vs. Stever, 222 U. S. 167, 32 Sup. Ct. 51, 56 L. Ed. 145, *and by this court in the cases of* Milby, 109 Fed. 638, 48 C. C. A. 574, Horman, 116 Fed. 350, 53 C. C. A. 570, O'Hara, 129 Fed. 551, 64 C. C. A. 81, Bartholomew, 177 Fed. 902; 101 C. C. A. 182, *and* Foster, 178 Fed. 165, 101 C. C. A. 485. *It is by the decisions settled, not as an all-inclusive definition, but as one sufficient for the purposes of this case, that the statutory 'scheme to defraud' may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange; and this deception may, of course, be by implication as well as by express words. On the other hand, the 'scheme' cannot be found in any mere expression of honest opinion as to quality or as to future performance. There must be the underlying intent to defraud.* Rudd vs. U. S. (C. C. A. 8) 173 Fed. 912, 97 C. C. A. 422; Brown vs. U. S. (C. C. A. 8) 146 Fed. 219, 76 C. C. A. 577. *It is true that the Durland case contemplates as within the statute 'suggestions and opinions as to the future'; but necessary limitations on a too broad*

construction of this language are indicated in the Mc-Annulty case, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90.

"As it arises in the present case, the question is: When does the not uncommon exaggeration of advertising become sufficient evidence of an intent to defraud? Can a business man, selling an article of merit and of value and at a fair price, be convicted of a scheme to defraud, because his advertising overstates the capacity and usefulness of the article? If so, where is the line to be drawn? And this brings us to the further question: How far are United States courts and juries to become censors of the advertising of manufacturers or dealers? This question stands out for answer, because nearly all business is now aided by advertisements passing through the mails, and on every hand we see claims of capacity, performance, and results which we know cannot stand cross-examination.

"On what we think an exhaustive review of all the reported cases arising under this statute, we do not find any one which seems, on its face, to be of the class we have mentioned — exaggerated claims of merits in articles of inherent utility — unless it is Faulkner vs. U. S., 157 Fed. 840, 85 C. C. A. 204, *in which the Circuit Court of Appeals in the Fifth Circuit reversed a conviction because based merely on exaggerated advertising. The subject is also considered by Judge Severens, then District Judge, who said, in* U. S. vs. Staples (D. C.) 45 Fed. 195, 198:

" 'Parties who have anything to sell have the habit of puffing their wares, and we are all familiar with the fact that it is a very prevalent thing in the course

of business to exaggerate the merits of goods people have to sell, and within any proper, reasonable bounds such a practice is not criminal. It must amount to some substantial deception, in order to be subject to cognizance by the courts.'

"The 'schemes' which have been punished have all smacked of the confidence game, of getting something for nothing, like selling worthless corporate stock (Wilson vs. U. S. (C. C. A. 2) 190 Fed. 427, 111 C. C. A. 231); *running a bucket shop under the pretense of doing real trading* (Foster vs. U. S. (C. C. A. 6) 178 Fed. 165, 101 C. C. A. 485); *running a 'fake' marriage bureau* (Grey vs. U. S. (C. C. A. 7) 172 Fed. 101, 96 C. C. A. 415); *getting consignments without intent to remit* (McConkey vs. U. S. (C. C. A. 8) 171 Fed. 829, 96 C. C. A. 501); *financial schemes impossible of performance* (Walker vs. U. S. (C. C. A. 9) 152 Fed. 111, 81 C. C. A. 329); *and the like. Schemes like those discussed in* Harris vs. Rosenberger (C. C. A. 8) 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762, *and in the cases it reviews, fall in this same class, because though the representation affects quality or performance. it directly pertains to a fact or a plan inherent in the substantial identity—the essential characteristics—of the thing itself; and even though the original and underlying business is legitimate, the use being made of it is fraudulent."*

It is our contention that the Congress in passing this Act to prevent the fraudulent use of the mails never intended to cover the complaints of dissatisfied customers in any line of legitimate business. If it did cover such, there is not a merchant or dealer in any line of legitimate busi-

ness who would not be subject to prosecution because of dissatisfied customers.

The Federal Reports have many cases emphasizing this particular point, the gist of the decisions being that the trial court should not permit a jury in a criminal case from deciding between satisfied and dissatisfied customers in determining a criminal intent to defraud. In *McLendon vs. U. S.*, 2 Fed. (2d) 660, the Sixth Circuit Court says:

> "The fact that one conducting a legitimate business, in part through the mails, sometimes defrauds his customers by misrepresenting his goods, does not make his business a scheme to defraud within this section."

The charge in the indictment that the petitioner was representing himself as engaged in the business of dealing in fresh, canned and dried mushrooms at wholesale and retail, and also engaged in the business of supplying mushroom growing outfits, including spawn, Amco Fertilizer, thermometers for testing mushrooms and manuals of instructions for mushroom culture under the name of Washington Mushroom Industries, was testified to in detail by the petitioner (R. 408, Vol. I). The uncontradicted evidence in the case shows that he was so engaged from 1933 to the time of the indictment in December, 1939 (R. 410, Vol. I), which evidence also shows that his was the only business of its kind buying mushroom products from his customers. A great deal of his literature that he sent to his patrons was taken from circulars sent out by the Department of Agriculture of the Government, as well as from a number of recognized mushroom com-

panies, all of which literature claimed that the growing of mushrooms was a simple process if the instructions were properly followed. He did purchase and promptly paid cash for all mushrooms received by his company. The charges in the indictment at best only charge the defendant with exaggeration and "puffing."

The Ninth Circuit Court in its decision did not follow and it is inconsistent with the decision of the Fifth Circuit Court in the case of *Faulkner vs. U. S.*, 157 Fed. 840. In that case Judge Shelby speaking for the court says:

> "Conceding that the scheme is sufficiently charged, there must be proof of it before the plaintiff in error could be rightfully convicted. The evidence shows without conflict that Faulkner was in fact engaged in business as advertised by him. He had, in fact, a large business. There was uncontradicted evidence that he had made arrangements to secure and had secured a 'cold storage' place for perishable foods. There was conflict in the evidence as to the size of the place, but that seems to us immaterial. The fact is he was simply advertising his business, and, if the advertisement contains some exaggerations, that does not constitute a scheme to defraud. It was shown that he failed to settle with some few of his patrons, and he offered to prove that he settled with large numbers of those who placed products in his hands for sale. The fact that one who advertises a business fails to make settlements with some of his creditors, the advertisements being substantially true, does not sufficiently tend to show a scheme or artifice to defraud to make it a question to be submitted to the jury. If the plaintiff in error is guilty of embezzlement, he may be

prosecuted for that offense under the laws of the state.

"After a close examination of all the evidence, which it would be entirely useless to copy into this opinion, we have reached the conclusion that there was no sufficient evidence before the jury to authorize the defendant's conviction of the offense charged. The charge requested by the plaintiff in error, directing the jury to acquit him, should have been given.

"The judgment of conviction is reversed, and the cause remanded for a new trial."

This *Faulkner* case is on all fours with the facts in the case at bar. The petitioner, Lelles, had a large business, running over six or seven years with an office, factory and warehouse, filling orders, buying mushrooms and trying to encourage the mushroom culture throughout the West and other parts of the country. We contend that the Ninth Circuit Court in deciding this case should have followed the decision in the *Faulkner* case. The decision of the Ninth Circuit Court is in conflict with the decisions of the Fifth and Sixth Circuit Courts as well as some of the others which have passed upon the statute of using the mails to defraud. This is an important question of general law which should be definitely settled by decision of the Supreme Court so that all business men engaged in a legitimate business would feel that their business is safe from the complaint of dissatisfied customers.

We ask the Court in deciding this petition for a writ to find one single statement of evidence in the record that contradicts the defendant that he was conducting a large

business of selling mushroom spawn and his Amco Fertilizer and purchasing mushrooms, paying cash promptly upon receipt of the same.

By granting the writ prayed for herein, we respectfully represent to the Court that we will be able to show that the petitioner was not violating the criminal statute menioned in the indictment.

CONCLUSION

WHEREFORE your petitioner respectfully prays that writ of certiorari be issued out of and under the Seal of this Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, the full and complete transcript of the record and all proceedings in this case, and that the said decision and judgment of the Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and your petitioner may have such other and further relief in the premises as this Court may deem meet and just.

ARTHUR T. LELLES,
Petitioner

By WILLIAM A. GILMORE,
Attorney for Petitioner.

(Appendix follows)

APPENDIX

"Section 338, Title 18 U. S. C. A. (Criminal Code, section 215.) Using mails to promote frauds; counterfeit money. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit-money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'green goods,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such

therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 502

ARTHUR T. LELLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 648–651) is reported in 120 F. (2d) 447.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 7, 1941 (R. 652). A petition for rehearing was denied July 21, 1941 (R. 653). The petition for a writ of certiorari was filed August 11, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also

Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was evidence warranting the submission to the jury of the question of petitioner's guilt.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Criminal Code, sec. 215; 18 U. S. C., sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted (R. 52–53) upon seven counts of an indictment in eight counts (R. 2–35),[1]

[1] The seventh count was withdrawn from the jury's consideration (R. 407, 595).

each charging the mailing of a different letter in execution of a scheme to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, in violation of 18 U. S. C., sec. 338.[2] Petitioner was sentenced to concurrent terms of three years' imprisonment on six counts (R. 55–58) and ordered placed upon probation for five years on the remaining count, probation to commence upon expiration of the three-year sentences (R. 58).

The case proved under the indictment may briefly be summarized as follows:

The scheme involved arose out of a mail-order business owned and operated by petitioner (R. 84–85, 408). Petitioner sold supplies, equipment, and instructions purportedly designed to enable purchasers profitably to grow mushrooms in such places as cellars, sheds, or other similar available space (Exs. 89, 100).[3] Having commenced business late in 1937 (R. 290, 413), petitioner had sold to over 5,000 customers by the time the indictment was returned in December 1939 (R. 35, 292). Petitioner advertised in 149 newspapers and in 27 magazines and periodicals at a monthly cost of about $1,000. He received from 75 to 100 replies per day, made sales to about 18 per cent of those

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[2] The principal fraudulent representations are indicated in the summary of evidence, *infra*, pp. 4–7.

[3] These and other exhibits referred to are on file with this Court.

replying, and apparently netted about $3,000 per month (R. 292). Mushroom spawn costing him about forty cents (R. 287) he sold for $4.90 (Ex. 100, p. 21). "Amco," a prepared fertilizer, costing him about four cents (R. 287), he sold for fifty-five cents (Ex. 100, p. 23).

Prospective customers were furnished with a booklet of sales literature entitled "Money in Growing Mushrooms at Home—Grow Them for Pleasure and Profit—They Pay" (R. 76; Ex. 100), in which the prospective customer was advised to "rush" his order, since petitioner's offer was "limited." Prospects who came to petitioner's place of business and requested that they be shown some mushrooms growing were informed that that was impossible because of the trouble which it would cause to petitioner's growers (R. 77).

In sales literature and advertisements prospects were informed that petitioner would purchase all mushrooms grown by them at thirty cents a pound or better (Ex. 66; 100, pp. 25, 30); that "Washington Mushroom Industries" (petitioner's trade name) was the "largest of its kind in the world"; that it was established in 1931 (Ex. 100, p. 6); that by using "Amco" fertilizer, "an amazing scientific new discovery", guesswork was eliminated (Ex. 100, p. 7). In support of his claim that mushrooms always commanded a high price, petitioner gave certain figures indicating that the demand for mushrooms was more than thirty-two times the available supply (Ex. 100, p. 8).

Petitioner placed emphasis upon the ease with which anyone could grow mushrooms (Ex. 100, pp. 8–12), "the practical certainty of success and the attractive profit possibility"; for example, "$30.00 weekly or more earned" (Ex. 17). Petitioner, however, knew of no one who had made $30 a week (R. 293, 469). In emphasizing the profit possibility, petitioner quoted the language from a text by William Falconer, an "eminent authority on mushroom growing" (Ex. 100, pp. 15–16). In these excerpts it was stated that the home growing of mushrooms was just as easy as the growing of flowers or any other plant, and that the secrets of mushroom growing were closely guarded, a fact explained as follows (Ex. 100, p. 16):

> "All this secrecy means just this," continues Mr. Falconer. "There is a FORTUNE in MUSHROOMS. I can assure you that there is no secret at all in growing them. Mushrooms bring fancy prices and the supply is never anything like equal to the demand. It is a poor bed that will not give four or five pounds of mushrooms per day. On a small bed you should get at least five quarts daily after the bed commences to bear."

Falconer was an authority on mushroom growing around 1890 to 1900 (R. 323, 342) and prices at that time were extremely high—$1.00 to $1.50 per pound, as against recent prices ranging from fourteen to thirty-five cents per pound (R. 323, 342, 403–404). The mushroom industry, it was shown,

has changed since Falconer's time in such a way that methods profitable then would be entirely unprofitable and unsuccessful now (R. 342, 343).

Persons sending in orders were sent a book of instructions, mushroom spawn, and an ordinary ten-cent thermometer for testing mushroom beds (R. 79). They were also urged to order at the same time "Amco," a prepared fertilizer devised to take the place of horse manure in mushroom growing and claimed by petitioner to have been his own invention (R. 79, 287, 413, 417; Ex. 100, pp. 5, 7, 10, 18, 20, 23, 24, 26 34). Petitioner's materials were wholly unsuitable for successful mushroom growing (R. 317, 326, 329, 330). Samples of spawn sold by petitioner were pronounced by expert witnesses for the Government to be worthless (R. 323, 360, 361) or not to be spawn at all (R. 314, 315, 324, 335, 341, 360). The "Amco" was drastically deficient in essential contents as a fertilizer (R. 317, 318, 322, 328). Prepared fertilizer of the "Amco" type had been the subject of research in the mushroom industry for many years but only partial success had been attained (R. 312, 313, 319). Petitioner had had no appreciable experience in the growing of mushrooms or in the preparation of mushroom spawn (R. 286–287, 464–466).[4]

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[4] Some of the spawn petitioner sold was purchased by him from other firms (R. 413–419), while some he made himself (R. 419).

There was evidence from which the jury could find that the profitable growing of mushrooms under the best conditions and with the best materials and equipment was an extremely difficult and complicated business, requiring experience and the closest attention to details (R. 315–318, 362). Dr. E. B. Lambert, a plant pathologist in charge of a Government mushroom project (R. 303), testified that "A mushroom crop is one of the most difficult to grow. There is no agricultural crop that is as complicated" (R. 316). A yield of two pounds to a square foot each planting was not, as claimed by petitioner (Ex. 100, p. 17), a normal crop, but an abnormal one even for commercial growers (R. 316).

For the Government some one hundred purchasers of petitioner's materials and instructions testified that they were wholly unsuccessful in growing mushrooms, many of them having failed to grow a single mushroom (see *e. g.,* R. 90, 99, 109, 127, 176, 180). Numerous complaints were made to petitioner but he continued business on the same basis (R. 99, 109, 136, 164, 209, 233, 234, 236, 241). Some fifty witneses testified on petitioner's behalf that they had grown mushrooms (R. 485, *et seq.*). While, according to Government witnesses, mushrooms might, under certain conditions, be grown by using petitioner's materials and following his instructions, the possibility of growing a satisfactory or profitable crop was exceedingly remote (R. 315, 317–318, 319, 330).

ARGUMENT

1. Petitioner contends that the affirmance by the circuit court of appeals of the overruling by the trial court of his motion for a directed verdict is inconsistent with this Court's decision in *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; that the jury was permitted to decide between that group of witnesses whose opinion of petitioner's business was unfavorable and that group whose opinion was favorable (Pet. 13–15).

The *McAnnulty* case is not comparable. There it was held that the Postmaster General was powerless to issue a fraud order based upon his determination that mental healing was not efficacious, since that was not determinable by proof but rested merely upon opinion. Here the issues presented are simply whether petitioner's representations that mushrooms could be easily and profitably grown by anyone who followed his instructions and used his materials were false and whether he knew them to be false.[5] These issues were entirely susceptible of proof.

2. Petitioner also contends that at most he was guilty of permissible "puffing" in his advertising literature and that, his business being legitimate, he should not be condemned because some of his customers were dissatisfied (Pet. 16–22).

[5] Indeed, so far as appears from the record, these were the dominant issues presented below (see R. 600, 609, 611–619, 622–623, 650–651). There is nothing to indicate that any reliance was placed upon the *McAnnulty* decision.

We submit that the trial judge in passing upon petitioner's motion for a directed verdict was entitled to draw a different inference from the evidence.[6] Petitioner's advertising and sales literature was patently designed to create the false impression that mushrooms could, with petitioner's supplies and under his instructions, be easily and profitably grown by anyone without appreciable risk of failure; that success and profit were virtually inevitable, although petitioner knew of many and repeated failures, with resultant loss of investment as well as profit. Supplemented by other misrepresentations and claims designed to instill confidence, such as that petitioner's business was the largest of its kind in the world, that it was organized in 1931, and that his instructions were "the most up-to-date, latest, and complete, simplified, step-by-step instructions" for the beginner in growing mushrooms (Ex. 100, p. 7), there can, we submit, be no doubt that there was enough evidence to go to the jury on the issue as to whether petitioner was knowingly conducting a fraudulent enterprise. Indeed, as was said by the circuit court of appeals, "the case presents a typical device of attracting the savings of little people by representing as certain and easy that which is speculative and difficult. If believed by the jury, there was ample evidence to support the thesis of

[6] The trial court was, of course, required to view the evidence in the light most favorable to the Government. *Gunning* v. *Cooley*, 281 U. S. 90, 94.

the indictment, namely, that the business carried on by [petitioner] and promoted through the use of the mails was not a legitimate or good faith enterprise, but was in essence an unconscionable racket, known by appellant to be such" (R. 651).

The case was submitted to the jury under most comprehensive instructions upon the pertinent issues (R. 594, 625) and, in view of the concurrence of that body, the trial judge and the circuit court of appeals in their estimate of the evidence, it would seem that petitioner has made no such showing as would require a further review of the evidence by this Court. *Delaney* v. *United States,* 263 U. S. 586, 589–590.

The cases relied upon by petitioner (Pet. 16–22) turn upon their own facts and are not analagous to the present case.

CONCLUSION

There exists no conflict of decisions and there is involved no question of public importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
HARDY K. MACLAY,
W. MARVIN SMITH,
Attorneys.

SEPTEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941